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ABSTRACT

This document examines legal issues in the negligent hiring and retention of North Carolina Department of Public Instruction school employees. There are no statutes that relate specifically to negligent hiring or retention; it is a judicially created area of law. This document centers around employees who cause injury to school children, but the ideas also apply to employees who injure adult staff or visitors. School administrators must report certain conduct to the state. Much of this conduct may also result in a negligent hiring or retention claim. Therefore, school officials must carefully investigate job applicants and pursue revocation in the cases of misconduct. A question-and-answer section highlights areas of concern to school officials. The appendix outlines North Carolina State laws relating to criminal record checks of school personnel. (LMI)

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A Series of Discussions on Legal Issues in Elementary and Secondary Education

SCHOOL MANAGEMENT ADVISOR

By Harry E. Wilson, Agency Legal Specialist

NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION EDUCATION BUILDING, RALEIGH, NC 27601-2825 919/715-1000

Issue 27 1993 BOB ETHERIDGE, SUPERINTENDENT OF PUBLIC INSTRUCTION

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Negligent Hiring and Retention

LEGAL REQUIREMENTS

There are no statutes that relate specifically to negligent hiring or retention, because this legal theory is based on the breach of an implied duty to hire persons who will not cause harm to others. It is a judicially created area of the law. However, G.S. 114-19.2 authorizes the Department of Justice to conduct criminal record checks of applicants for public school employment who consent to the check. The statute is set out in the Appendix.

INTERPRETIVE ANALYSIS

There are increasing instances in which school children have been injured by school employees. As a result, parents have sued school officials on the basis that their negligence in hiring or retaining the employee was a factor that contributed to the injury, and that school officials should pay them for that injury.

The basis for a claim of negligent hiring and retention is that school officials have exposed others to a dangerous person. This view includes the idea that school officials owed a duty to the plaintiff to employ and retain only qualified employees who would not harm the plaintiff; that the employee was in fact unqualified or had a history of the type of harm complained of; that the school officials either knew of the lack of qualification or the history, or that they should have known of it; and that plaintiff's injury resulted from acts related to that unfitness. The employee may harm the student either intentionally or negligently.

It is unlikely that school officials will be held liable for harm caused by independent contractors who are on school premises; negligent hiring and retention applies only to actual school board employees. But if a school official knows that a contractor has an employee who has injured children, allows that person on school grounds, and the person causes injury to a child, the official could be held liable for negligence by not taking reasonable steps to prevent the harm.

The discussion in this Issue centers around employees who cause injury to school children, but the ideas are applicable to employees who injure adult staff or visitors, as well. As is discussed in Issue 28, Certificate Suspension and Revocation, the State Board of Education has revised its revocation rule to require school administrators to report certain conduct to the State. Much of this conduct may also result in a negligent hiring or retention claim. For example, if a teacher sexually molests a student and is allowed to resign, another school system that later employs the teacher may face a lawsuit if the teacher repeats the action in that system. This shows that school officials must carefully investigate applicants for employment so that they may discover any record of this kind of misconduct. School officials should also pursue revocation, at the very least, to prevent the recurrence of such incidents.

Q: Do North Carolina school systems have a duty to protect students from harm?

A: No, there is no absolute duty to protect students from harm. However, where school officials know or should know of a dangerous situation which may reasonably cause harm to students and others, they at least have a duty to warn those who may be injured. If the source of potential harm is an employee, there may also be a duty to minimize the risk of that harm. In other words, school officials should act to limit the opportunities for the harm to occur.

For example, if there have been complaints

The School Management Advisor, a series of comments, questions and answers, and interpretive analyses, is published periodically. Each issue deals with a single topic that is of current concern to school personnel. The contents do not purport to be official legal opinions.

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that a driver education instructor has taken liberties with female students, a proper response would be to relieve the instructor of those duties until an investigation could be completed. It might also be proper to warn the instructor not to be in the car with only female students, but there is the risk that the instructor will ignore the warning, sexually assault a female, and charges result against school officials for not taking more effective steps to prevent the assault.

Q: What is the basis of any duty to protect school children?

A: The duty may come from both common law (court decisions) and statutes. Courts in some states, but not in North Carolina, have said that there is a duty on school officials to provide employees who will not harm the students in their care.

Statutes may also create a duty. G.S. 114-19.2 authorizes school officials to obtain a criminal records check of applicants who consent to the check. If the law gave applicants no choice, school officials would have a duty based on the information they would obtain through the criminal records check. Title IX of the Education Amendments of 1972 prohibits sexual harassment in education, and employers have a duty to protect students from an employee when there is some reason to believe the employee has sexually harassed a student. Similarly, G.S. 115C-106 and -107 create the right of an exceptional child to a free appropriate public education and the duty of the State to provide that education. This could form the basis for a negligent hiring and retention suit if an employee in the special education program, through incompetence or lack of qualification, harmed a student.

Q: Might school boards unintentionally create a duty to protect students?

A: Yes, if their policies are written too broadly. For example, if the board's student conduct policy states that all students have a right to a safe learning environment, those words may create the duty to provide that environment, including assuring that staff cause no harm to students.

Q: What actions by a school employee may result in a negligent hiring and retention claim?

A: As mentioned earlier, when school officials receive a report that an employee has sexually harassed a student, the officials are on notice that this behavior may recur. Even if the employee has a spotless reputation, school officials should conduct a prompt, thorough investigation to establish whether the act occurred or not. Otherwise, they may face civil liability if a second violation occurs.

If a school board has adopted a drug testing policy and staff either do not follow the policy or fail to act upon the positive result of a drug test, then the employee harms a student while taking drugs, a negligent hiring and retention claim will likely follow.

Q: In what ways might an employee be unqualified for a position such that a negligent hiring and retention claim might be filed?

A: First, the employee may have had a criminal record at the time of application and employment that the employer could reasonably have discovered. The application might also have disclosed other deficiencies, such as inadequate training for the position, or failure to meet the experience requirement. The employee's references could disclose a tendency toward improper behavior, such as lack of care or inadequate student behavior management skills. The employee might have a mental disorder or some disabling condition that a medical examination required for employment could disclose.

Q: On what basis can school officials be said to have known of the employee's lack of qualification?

A: The legal language used is that school officials "knew or should have known" of the employee's lack of qualification. This means that the officials either had first-hand knowledge of the matter or through reasonable efforts could have obtained it. The "should have known" provision may cause the most concern, and there are several ways that school officials

may be said to have this constructive knowledge of the employee's lack of qualification.

When school officials receive an employment application, their first response should be to examine the application to assure that the applicant meets the qualifications for the job. If there is a deficiency in the person's qualifications, the application should not be considered. Once the hurdle of minimum qualification is cleared, school officials should look into the applicant's performance on previous jobs, as well as the applicant's background. While a background check may include a criminal records check, it need not be limited to that check. References and previous employers should be contacted. School officials should also be careful to follow the board's employment policy or procedure if it requires some investigation of particular types of information, such as a history of drug use or sexual misconduct.

Assuming that these efforts have produced no negative information and the applicant is hired, the employer should then perform regular and meaningful evaluations of the employee's performance. Observation and evaluation may disclose information that indicates some problem. Finally, if a problem is disclosed either through the evaluation process or from a complaint filed by a student, teacher or parent, failure to investigate or a tardy investigation may cause the employer to be charged with knowledge of the employee's lack of qualification.

Q: What action may school officials take to minimize claims for negligent hiring and retention?

A: School officials should always contact an applicant's previous employers and references to see if there are reasons that the applicant should not work around children. The interview process should include asking permission to conduct a criminal background check, which the applicant is free to refuse. If this process does not disclose negative information and the person is hired, the employee should be evaluated fully and objectively, as each employee should be. Whenever any complaint is made about the employee's conduct toward students, school officials should immediately conduct a complete investigation. Each complaint should be taken seriously and investigated properly.

Our courts have held that a school system was not liable for an employee's assault on a student, even though the employee had engaged in similar behavior while employed by another school system. The decision was based on evidence that the school system had followed school board policy in investigating and hiring the employee; that it had evaluated the employee each year; and that when evidence of the alleged assault was presented, it promptly asked for his resignation.

Q: Schools are often faced with financial difficulties. Might this contribute to a negligent hiring and retention claim?

A: Yes. When funds are limited, schools have to seek ways to stretch the funds they have. This may include hiring fewer and less experienced staff and providing less staff development than normal. As classes become larger and as staff are not as experienced, the potential for harm increases, including negligent hiring and retention.

Q: What may be the result if a school system provides a good reference to other school systems for a former employee who was allowed to resign after intentionally molesting students?

A: If another school system (or any other employer) hires the person on the basis of that reference and the person negligently or intentionally injures someone while on the job, the new employer may sue the former employer for negligent referral. A negligent referral is one that conveys inaccurate, misleading or incomplete information that leads the new employer to hire the person.

School administrators should be aware of the recent amendment to the State Board's certificate revocation rule that requires them to report certain types of misconduct by certificated employees. The purpose of the amendment is to prevent a school system from passing a problem employee from one school to

another, or to another school system, when that employee is likely to injure children. This duty to report may help school administrators deal effectively with an employee who may potentially cause a negligent hiring/retention or negligent referral suit.

Q: What information should school officials look for from an applicant to minimize negligent hiring and retention claims?

A: Obviously a potential employer should be alert for any information that indicates the applicant has had problems working in a school setting before. This kind of information should cause school officials to ask for more details. But they should also look for evidence that the applicant has the positive qualities desired of a school employee. One means of getting this from a former employer is to ask if that employer would hire the person again, if the opportunity arose.

APPENDIX

Laws Relating to Negligent Hiring and Retention

§ 114-19.2. Criminal record checks of school personnel.

(a) The Department of Justice may provide a criminal record check to the local board of education of a person who is employed in a public school in that local school district or of a person who has applied for employment in that local school district, if the employee or applicant consents to the record check. The information shall be kept confidential by the local board of education as provided in Article 21A of Chapter 115C.

(b) The Department of Justice may provide a criminal record check to the employer of a person who is employed in a nonpublic school or of a person who has applied for employment in a nonpublic school, if the employee or applicant consents to the record check. For purposes of this subsection, the term nonpublic school is one that is subject to the provisions of Article 39 of Chapter 115C of the General Statutes, but does not include a home school as defined in that Article.

(c) The Department of Justice shall charge a reasonable fee for conducting a criminal record check under this section. The fee shall not exceed the actual cost of locating, editing, researching, and retrieving the information.

(d) The Department of Justice shall adopt rules to implement this section.

FOR FURTHER READING:

Allred, "Recruiting and Selecting New School Employees," School Law Bulletin, Fall 1987.

School Management Advisor, Issue 22, Employment Basics.

School Management Advisor, Issue 23, Employment at Will.

School Management Advisor, Issue 24, Reduction in Force.

School Management Advisor, Issue 25, Nonrenewal of Probationary Employees.

School Management Advisor, Issue 26, Dismissal of Career Status Employees.

School Management Advisor, Issue 28, Certificate Suspension and Revocation.